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Office of Administrative Law Judges
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Issue Date: 10 May 2005

CASE NO.: 2005-LHC-245

OWCP NO.: 07-160842

IN THE MATTER OF

EVERETT NECAISE,
Claimant

v.

HALTER MARINE,
Employer

and

ZURICH AMERICAN INSURANCE CO.,
Carrier

APPEARANCES:

Mager A. Varnado, Esq.
On behalf of Claimant

Patrick E. O'Keefe, Esq.
On behalf of Employer/Carrier

Before: Clement Kennington
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, *et seq.*, brought by Everett Necaie

(Claimant) against Halter Marine (Employer). The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held on February 28, 2005, in Gulfport, Mississippi.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions.¹ Claimant testified and introduced 14 exhibits, which were admitted, including: various Department of Labor filings; medical records from American Medical Response, Hancock Medical Center, Drs. Joe Jackson, Tim Jackson, Mousa Maalouf, Charles Holman, Harry Danielson and Michael Lowery; and records from Allrehab. Employer introduced 12 exhibits, which were admitted, including: various Department of Labor forms; medical records from Drs. Lowery, Maalouf, Joe Jackson, Tim Jackson, Holman, Barbara Massony, Michael Diaz, Angela M. Franizza, Eric Lawson, and physical therapist Timothy Haller; and reports from case manager Michelle M. Edwards.

Post-hearing briefs were filed by the parties. Based upon the stipulations of the parties, the evidence introduced my observation of the witness demeanor and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

I. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

1. Claimant was injured on July 12, 2001, during the course and scope of his employment with Employer.

¹ References to the transcript and exhibits are as follows: Trial transcript- Tr.____; Claimant's exhibits- CX-____, p.____; Employer exhibits- RX-____, p.____. Many of the exhibits contain duplicates; for example, RX-1 (Dr. Lowry's medical records) contains duplicates of CX-13 with the exception of RX-1, p. 6, which is a report of Dr. Lowry, dated March 28, 2003. In cases where duplicates occur, reference will generally be made to only one exhibit.

At the beginning of the hearing Employer objected to the reports of Dr. Danielson and All rehab unless given the right to depose Dr. Danielson and Gabriel Enescu, the author and physical therapist responsible for Allrehab functional capacity evaluation. (CX-12, 14). I granted Employer additional time to depose these individuals and admitted those exhibits. I also admitted, over the objection of Claimant, RX-1, p. 20, the memorandum of informal conference to show Claimant's wages as a roofer and driver, and RX-12, the reports of case manager, M. Edwards, R.N.

2. An employer/ employee relationship existed at the time of the injury.
3. Employer was advised of the injury on July 12, 2001.
4. Employer filed notices of controversion on July 1, 2002 and June 16, 2004.
5. An informal conference was held on October 7, 2003.
6. Employer paid temporary total benefits from July 13, 2001 to February 3, 2002, and March 22, 2002 to July 22, 2002, at \$321.74 per week for a total of \$15,121.67.
7. Claimant's date of maximum medical improvement was May 21, 2002.

II. ISSUES

The following unresolved issues were presented by the parties:

1. Claimant's loss of wage earning capacity.
2. Nature and extent of injury.
3. Attorney's fees and expenses.

III. STATEMENT OF THE CASE

A. Background and Chronology:

Claimant is a 47-year old male with a twelfth grade education and one year of vocational training in welding. Claimant has almost 24 years experience as a shipyard welder, welder foreman and leadman welder. (Tr. 26-27). Before coming to work for Employer, Claimant worked for Avondale Industries as a salaried welder foreman making \$696.00 per week. This was the equivalent of \$17.40 per hour for a 40 hour week. Claimant quit his employment with Avondale in January, 2001, because of an inability to earn overtime pay despite the fact he worked overtime hours approximately half of the time. On February 1, 2001,

Employer hired Claimant as a leadman welder making \$16.75 per hour. Claimant worked in that position until his injury of July 12, 2001, averaging 60 to 68 hours per week and, on occasion, up to 84 hours on seven twelve-hour schedules. (Tr. 29, 42-46). As a leadman welder Claimant was responsible for supervising the work of other welders which required him to assign work and make sure it was done by personally overseeing the work. In order to accomplish this task, Claimant had to climb in and out of holes and dry docks frequently lifting, bending, stooping, climbing and carrying objects weighing up to 60 or 70 pounds. (Tr. 28, 57).

On July 12, 2001, while in the process of lining up work on a Crowley barge and climbing over a bulkhead, Claimant fell off a ladder about five feet, landing on his back and striking his head on an angle iron. (Tr. 29, 30). Employer took Claimant by ambulance to the emergency room of Hancock Medical Center where he was examined, x-rayed and diagnosed with lumbar strain, prescribed Darvocet, and told to take three days off followed by three days of light duty. (CX-6, 7).

Claimant, however, continued to experience severe neck, low back and leg pain, and on the following day filed a choice of physician form seeking treatment by Dr. Mousa Maalouf, who saw Claimant on July 13, 17, 24, August 29, October 4, December 20, 2001, and February 20, 2002. (Tr. 31; CX-10; RX-2). Dr. Maalouf was apparently unable to alleviate Claimant's pain problems and referred him to neurologist Dr. Joe Jackson, who saw Claimant on two occasions, August 7 and 23, 2001, but was also unsuccessful in relieving his symptoms. (RX-3). Dr. Maalouf then referred Claimant to orthopedist Dr. Tim Jackson, who saw Claimant on two occasions, September 13 and October 4, 2001. (RX-5). Dr. Tim Jackson was also unable to provide relief to Claimant and in turn he referred Claimant to neurosurgeon Dr. Michael Lowry. (RX-5). Dr. Lowry saw Claimant on five occasions: December 13, 2001, January 23, February 25, March 28 and May 21, 2002; but, like the previous physicians, he was unable to provide relief and referred Claimant to an urologist. (RX-1). Claimant attempted to see urologist Dr. Matthews; however, the claims adjuster would not approve the extensive testing requested by Dr. Matthews. In turn, Employer referred Claimant to urologist Dr. Charles Holman, who saw Claimant on May 1 and July 8, 2002, but was unable to alleviate Claimant's complaints of erectile dysfunction. (CX-11). When Dr. Lowry refused to provide further treatment, Claimant sought out Dr. Harry Danielson, who saw him once, on November 20, 2003, for evaluation.

Since his injury, Claimant has undergone a series of seven (7) diagnostic tests in conjunction with his treatment. The first testing was a series of x-rays of

the lumbar, thoracic and cervical spine taken on July 12, 2001, at Hancock Medical Center, all of which were normal with no acute findings. (CX-7, p. 2). The second testing was another series of x-rays of the cervical and lumbar spine ordered by Dr. Maalouf, taken on July 17, 2001, and was normal. (RX-2, p. 6). The third test was an MRI of the cervical spine taken on July 27, 2001, at Dr. Maalouf's direction, and showed no abnormality. (RX-7, p. 1). The fourth test was a nerve conduction study done by Dr. Joe Jackson on August 23 and 24, 2001, which was normal for the arm and leg but showed moderately severe right tunnel entrapment of the right wrist and minimum to mild cubital tunnel changes at the right elbow. (CX-8, pp., 6-7; RX-3, p. 6). The fifth test was a pelvic MRI taken on October 15, 2001, and read by Dr. Angela M. Fanizza as showing mild arthrosis of the left hip with tiny erosions and degenerative changes of the facet joints of the lumbosacral spine and SI joint spurs. (CX-9, p. 2). On November 29, 2001, Dr. Tim Jackson informed the medical case manager that Claimant had a herniated disc at L5-SI, as indicated on an MRI. However, no MRI confirms that statement. (CX-9, p. 1).

On January 16, 2002, Dr. Lowry had a bone scan performed which was essentially normal. (CX-13, p. 7). On January 18, 2002, Dr. Lowry had a CT lumbar myelogram performed which showed minimal right neural foraminal stenosis at L4 secondary to asymmetric facet joint hypertrophic changes and L5 spondylolysis bilaterally with no evidence of spondylolisthesis. (CX-13, p. 6). A plain film myelography taken that same day, showed no disc or bone abnormalities. (RX-9, p. 2).

Claimant was off work from July 13, 2001, through February 3, 2002, during which time he was paid temporary total benefits of \$9,468.26 at a rate of \$321.74 per week for 29 weeks and 3 days. (RX-11, pp. 17, 58). Claimant returned to light duty performing office work for approximately seven weeks, until he was laid off on March 22, 2002, due to plant closures secondary to economic reasons. Thereafter, Employer continued to pay Claimant temporary total benefits until July 23, 2002, when he was released by Dr. Lowry to return to his former job. (Tr. 35-38). In June, 2003, Claimant began work as a roofing subcontractor for Mandel's Roofers on a Bellaire School project in Gulfport, Mississippi. This work required him to climb ladders and work with a crew of eight other employees carrying 42 foot sections of sheet metal. According to Claimant, he had to quit this job after three weeks secondary to back and leg pain and an inability to climb. This job paid \$12.00 per hour. This job was followed by a job at a repair garage in Long Beach, Mississippi, where Claimant cleaned parts and drove a truck picking up auto parts at \$6.25 per hour, 30 hours per week. (Tr. 38, 39, 53, 54).

B. Claimant's Testimony

Claimant testified about his work background, job responsibilities, accident and treatment as previously described. Claimant testified that despite his medical treatment, which has included physical therapy and medication, he continues to experience constant low back, hip and leg pain.

Claimant contends that as a result of the accident he has also experienced erectile dysfunction which failed to respond to treatment by Dr. Holman. Claimant currently goes to a pain management clinic for his pain, which he asserts is at a level seven out of ten and prevents him from raising his 11-year old as he wants or cutting his grass. (Tr. 32-36).

Claimant testified that his work as a welder required him to lift between 60 and 70 pounds and do a lot of bending and twisting, which he is not able to do. Claimant testified Dr. Danielson released him to light duty and no physician has released him to do his former welding duties. However, on cross-examination, he admitted that on May 21, 2002, Dr. Lowry stated Claimant had reached maximum medical improvement with a 3% permanent partial impairment and that he (Dr. Lowry) recommended Claimant lift 30 pounds for one month and then 60 pounds for the next month, and then resumes his usual duties. (Tr. 59-60; RX-1, p. 7).

Notwithstanding Dr. Lowry's recommendations, Claimant testified that he picked up only 30 pounds once or twice and never lifted 60 pounds, but had an ability to lift 10 pounds repeatedly and 20 pounds occasionally. Further, he takes six Lortab pills daily to alleviate his pain. Claimant testified he felt Dr. Lowry was not interested in treating him or any other patients; rather, he was looking to close his practice so he could move to Hattiesburg, Mississippi. (Tr. 60-63).

C. Claimant's Medical Treatment

Concerning Claimant's medical treatment, Claimant's initial choice of physicians was Dr. Maalouf who saw Claimant on 7 occasions: July 13, 17, 24, August 29, October 4, December 20, 2001, and February 20, 2002. Dr. Maalouf's treatment notes are handwritten and difficult to read. However it is clear from these notes that he provided conservative care, including referral to other specialists for Claimant's complaints of back and neck pain and prescribed Relafen, Flexeril and Lortab. In addition, Dr. Maalouf ordered diagnostic testing, including x-rays and MRI, which failed to reveal any significant abnormality. (CX-10; RX-2, 6, 7).

Claimant's second treating physician, neurologist Dr. Joe Jackson, saw Claimant on two occasions, August 7 and 23, 2001. On the initial visit Claimant had an antalgic gait and walked with his right arm held tightly to his body in a flexed position with a clenched fist. Claimant had limited cervical lumbar range of motion, complained of neck pain, and had trigger points in the back. The remainder of the exam was normal. Dr. Jackson's initial impression was cervical and lumbar strain and blunt trauma; he recommended somatosensory studies to evaluate possible spinal cord trauma and a nerve conduction study to rule out peripheral nerve entrapment and to evaluate brachial plexus. Those studies were conducted on August 23, 2001, and, along with an MRI, they failed to show any evidence of significant discogenic injuries in cervical spine, and revealed a mild bulge at L5-S1 with only peripheral entrapments at the carpal and cubital tunnels. As of the second visit, Dr. Jackson found no explanation for Claimant's complaints and suggested referral to an orthopedist. (RX-3).

Orthopedist Dr. Tim Jackson saw Claimant on two occasions, September 13 and October 4, 2001. On the initial examination, Claimant, despite his complaints, appeared to be in no acute distress and demonstrated moderate tenderness to palpation over the sacrum, coccyx and lumbosacral junction areas with mild paraspinal tenderness. Spinal x-rays were normal. Dr. Jackson recommended physical therapy and an MRI. On the second visit, Claimant voiced the same complaints. The physical exam was unchanged. Dr. Jackson recommended a pelvic MRI and follow-up treatment with Dr. Lowry. (RX-5). A pelvic MRI performed on October 15, 2001, showed only mild arthrosis of the left hip joint, tiny erosions and degenerative changes of the facet joints of the lumbosacral spine, and SI joint spurs. (RX-8).

Neurosurgeon Dr. Lowry saw Claimant on five occasions: December 13, 2001, January 23, February 25, March 28 and May 21, 2002. On the first visit, Claimant presented as a well-developed, well-nourished male who appeared to be in some discomfort. The neurological exam was normal and the neurodiagnostic studies showed only very mild degenerative changes resulting in a negative work-up. In view of Claimant's complaints, Dr. Lowry ordered a lumbar myelogram and CAT scan. By the second visit, Dr. Lowry had reviewed the myelogram and CAT scan which were essentially normal with an element of spondylolysis at L5-S1, but no instability. Despite the minimal negative findings, Claimant still complained of severe right leg pain. Dr. Lowry recommended a nerve conduction study of the legs and prescribed Lortab 5. After reviewing an earlier nerve conduction study of the legs, Dr. Lowry did not order a second one. On the third

visit, Claimant continued to voice the same complaints in addition to penile erection problems for which Dr. Lowry referred Claimant to an urologist. On the fourth visit, Claimant's condition was unchanged. Dr. Lowry encouraged Claimant to see urologist, Dr. Holman.

By the fifth and last visit on May 21, 2002, Claimant stated he had good and bad days, but continued to complain of an inability to cut his grass or do anything requiring exertion secondary to pain. Regarding Claimant's condition, Dr. Lowry stated:

At this time I think the patient has reached maximum medical improvement. He has a 3% permanent impairment as a result of his back injury. I think he can return to work at this time. I would recommend a 30 pound weight limit for the first month, a 60 pound weight limit for another month then he can resume his usual duties. I have nothing else to add and I do not need to see him again.

(RX-1, p. 8).

Subsequent treatment by urologist Dr. Holman on two occasions failed to reveal any erectile dysfunction related to Claimant's July 12, 2001 fall. (CX-11). On Claimant's last neurosurgical consultation with Dr. Danielson on November 20, 2003, Claimant presented with pain in his hips, legs, right arm with numbness in his large and second toes on both feet. Dr. Danielson found some decreased L5 sensation bilaterally, but noted magnification and giving away during muscle testing. Dr. Danielson noted that Claimant did everything slow and calculating, and recommended he continue light lifting of 25 to 30 pounds occasionally. (CX-12). In a March 1, 2004 letter to medical case manager Ms. Kitchen, R.N., Dr. Lowry noted that Dr. Danielson agreed with his findings.

In addition to the medical records, the evidence contains thirteen progress reports of case manager M. Edwards, R.N., which reflect Claimant's treatment, medical history and coordination of services, noting Dr. Lowry returned Claimant to full duty work on July 23, 2002. (RX-12). Finally, the evidence contains a functional capacity evaluation (FCE) obtained by Claimant on January 19 and 24, 2005, in obvious anticipation of litigation. The FCE indicates Claimant presented with complaints of low back and leg pain with difficulty walking. The examiner, Gabriel Enescu, stated Claimant had cervical mobility and firm grasping, and was

capable of pushing, pulling, kneeling crouching, crawling, climbing and squatting on an occasional basis, but due to pain he was not able to walk more than 1 hour or more than ½ hour after prolonged sitting, stand more than ½ hour, and had to take frequent breaks. Thus, Claimant could not perform his previous job in a safe manner. Mr. Enescu limited Claimant to a 2-hour work day with sitting limited to 10%, standing 20% and walking 70% of the time. There was no testing of lifting above shoulder, carrying, or one-foot standing due to pain complaints. (CX-14).

The parties took the post-hearing deposition of Mr. Enescu on March 22, 2005. Mr. Enescu testified he looked at both the physical and psychological aspects of an FCE. He did not have any copies of Claimant's medical records or diagnostic studies, testifying he evaluated his patients as they present to him that day without being influenced by prior medicals. (CX-15, pp., 18-22, 29-30). Mr. Enescu also testified Claimant's medications had no effect on the outcome of his testing or opinions; however, he was aware Claimant was taking Lortab at the time of the FCE. His evaluation was based on pain level, activities the patient can perform, level of pain during those activities and his physical ability during the actual evaluation. Mr. Enescu clarified the FCE evaluation was conducted in a two-hour time frame. (CX-15, pp., 22, 40, 43). Mr. Enescu further testified he found no malingering or symptom magnification on behalf of Claimant; although he has diagnosed such conditions in 30-40% of his patients. Additionally, he found no discrepancies between the FCE results and Claimant's statements in his self-provided history. When Claimant scored his activities, Mr. Enescu found no cause for suspicion or inappropriate scoring; although, he opined Claimant had a low tolerance to pain. However, Mr. Enescu testified he did not know about Claimant's job as a driver, which may contradict the FCE results if he is capable of driving two to three hours with less pain. (CX-15, pp., 40-41, 44, 49-50, 54).

IV. DISCUSSION

A. Contention of the Parties

Claimant contends he is totally disabled, as evidenced by his inability to work as a roofer, a job less physically demanding than a welder. Claimant asserts Dr. Lowry's progressive release to work should not be credited, as it only represented a hope of Dr. Lowry that Claimant would be able to return to work in July, 2002. Moreover, Dr. Lowry dropped Claimant as a patient when he moved his practice and never followed up on Claimant's work progress. Instead, Claimant

urges the undersigned to credit Dr. Danielson's opinion and the January, 2005, FCE indicating that Claimant can only perform light duty work. In light of his finding post-injury employment, Claimant contends he is now entitled to permanent partial disability benefits. Claimant also argues his benefits should be based on an average weekly wage of \$696, the earnings he made at Avondale Industries prior to his work at Employer; thus, he claims a reimbursement for underpaid temporary total disability benefits. Claimant further argues his post-injury wages of \$6.25 per hour, or \$187.50 per 30-hour week, constitute his current wage earning capacity, thus he is entitled to permanent partial disability benefits pursuant to a loss in wage earning capacity of \$508.50 per week.

Employer argues Claimant is an incredible witness, as evidenced by reports of his malingering and his questionable treatment at the pain management clinics. Employer further urges the undersigned to credit Dr. Lowry's opinion as Claimant's treating physician over those of Dr. Danielson and Mr. Enescu who only evaluated Claimant in preparation for trial. In light of Dr. Lowry's work release dated May 21, 2002, it is Employer's position Claimant is able to return to his former position of welder. In the alternative, if Claimant is found to be totally disabled, Employer asserts it has discharged its burden to establish suitable alternative employment by offering Claimant light duty work in its facility. Employer contends Claimant's subsequent lay-off was for economic reasons unrelated to his disability, thus its burden is not renewed. As such, Employer argues Claimant's post-injury wage earning capacity should be based on the wages he earned working light duty at Employer, adding that it is Claimant's burden to show these wages would not fairly represent his post-injury wage earning capacity.

B. Credibility of Parties

It is well-settled that in arriving at a decision in this matter the finder of fact is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 467 (1968); *Louisiana Insurance Guaranty Ass'n v. Bunol*, 211 F.3d 294, 297 (5th Cir. 2000); *Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 1032 (5th Cir. 1998); *Atlantic Marine, Inc. v. Bruce*, 551 F.2d 898, 900 (5th Cir. 1981); *Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9, 14 (2001). Any credibility determination must be rational, in accordance with the law and supported by substantial evidence based on the record as a whole. *Banks*, 390 U.S. at 467; *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 945

(5th Cir. 1991); *Gilchrist v. Newport News Shipping and Dry Dock Co.*, 135 F.3d 915, 918 (4th Cir. 1998); *Huff v. Mike Fink Restaurant, Benson's Inc.*, 33 BRBS 179, 183 (1999).

Employer contends Claimant is an incredible witness, as he was found to exhibit signs of malingering and symptom magnification and is addicted to Lortab which he received from disreputable doctors. Employer also contends the opinions of Dr. Lowry, Claimant's treating physician, should be given more weight than those of Dr. Danielson or Mr. Enescu, who only saw Claimant for evaluation purposes in preparation for the formal hearing.

Notwithstanding Employer's contentions, I find Claimant to be a credible witness. Although Dr. Danielson and physical therapist Haller both noted symptom magnification and malingering on behalf of Claimant, five other doctors and two other physical therapists made no such findings. Notably, Dr. Lowry, who Employer argues should be credited as Claimant's treating physician, did not note any signs of malingering. While Claimant apparently does suffer from an addiction to Lortab which he received from "dirty doctors," I do not find this condition constitutes a reason to discredit Claimant. Dr. Jackson and Dr. Lowry both prescribed Claimant Lortab, which Employer does not contend was unnecessary or unreasonable medical treatment at that time. Further, Employer noted in its post-hearing brief that schedule III controlled substances, including Lortab, are habit-forming and can be addictive. There is no evidence that Claimant was taking Lortab prior to his work-related accident. Thus, I find this addiction to be a result of his accident and subsequent medical treatment, not evidence of his alleged incredibility. Moreover, I found Claimant's testimony at the formal hearing generally in harmony with the evidence in record and was internally consistent. In light of the foregoing, I find Claimant to be a credible witness.

I agree with Employer's argument that Dr. Lowry was Claimant's treating physician and, as such, deference should be given to his opinions regarding Claimant's condition. Claimant's general practitioner, Dr. Maalouf, treated Claimant a total of seven times, but did not render any opinions regarding Claimant's medical condition, instead referring him to a number of specialists and managing said referrals. Dr. Tim Jackson, a neurologist, and Dr. Joe Jackson, an orthopedic physician, each saw Claimant on two occasions. Dr. Lowry, a neurosurgeon, treated Claimant a total of five times and released him back to work in May 2002. Curiously, Dr. Lowry did not seek to follow-up on Claimant's progress in returning to work. The record contains no explanation for this lack of medical attention, though it appears Dr. Lowry moved his practice from Gulfport

to Hattiesburg, Mississippi. In a letter dated March 1, 2004, almost two years after Dr. Lowry last saw Claimant, he deferred to Dr. Danielson for any questions regarding Claimant's need for work restrictions. Thus, while I will give Dr. Lowry's opinions the deference generally granted treating physicians, I will follow his deferral to Dr. Danielson for any work restrictions which Claimant's condition may currently require.

C. Nature and Extent of Injury

Disability under the Act is defined as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Disability is an economic concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the extent (total or partial). A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968); *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement (MMI).

The determination of when MMI is reached, so that a claimant's disability may be said to be permanent, is primarily a question of fact based on medical evidence. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989). *Care v. Washington Metro Area Transit Authority*, 21 BRBS 248 (1988). An employee is considered permanently disabled if he has any residual disability after reaching MMI. *Lozada v. General Dynamics Corp.*, 903 F.2d 168, 23 BRBS (CRT)(2d Cir. 1990); *Sinclair v. United Food & Commercial Workers*, 13 BRBS 148 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). A condition is permanent if a claimant is no longer undergoing treatment with a view towards improving his condition, *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982), or if his condition has stabilized. *Lusby v. Washington Metropolitan Area Transit Authority*, 13 BRBS 446 (1981).

In the present case, the parties stipulated Claimant reached MMI as of May 21, 2002, as per the opinion of Dr. Lowry. Accordingly, I find his temporary disability became permanent as of that date.

(1) *Prima Facie* Case of Total Disability

The Act does not provide standards to distinguish between classifications or degrees of disability. Case law has established that in order to establish a *prima facie* case of total disability under the Act, a claimant must establish that he can no longer perform his former longshore job due to his job-related injury. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981); *P&M Crane Co., v. Hayes*, 930 F.2d 424, 429-30 (5th Cir. 1991); *SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 444 (5th Cir. 1996). A claimant need not establish that he cannot return to *any* employment, only that he cannot return to his *former* employment. *Elliot v. C&P Telephone Co.*, 16 BRBS 89 (1984). A finding of disability may be established based on a claimant's credible subjective testimony. *Director, OWCP, v. Vessel Repair, Inc.*, 168 F.3d 190, 194 (5th Cir. 1999)(crediting employee's reports of pain); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 944-45 (5th Cir. 1991)(crediting employee's statement that he would have constant pain in performing another job). The same standard applies whether the claim is for temporary or permanent total disability. If a claimant meets this burden, he is presumed to be totally disabled. *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986).

In the present case, on May 21, 2002, Dr. Lowry released Claimant to an incremental return to his formal job duties, involving lifting 30 pounds regularly for one month, followed by lifting 60 pounds for one month before returning to his former job as a welder. However, there was no follow up treatment to this plan by Dr. Lowry. Although Claimant's job at Employer had been eliminated, he did find work as a roofer and attempted to perform that job for three weeks. Although the record does not contain the official physical demand levels required of a roofer, based on Claimant's testimony I find the position inherently involves a fair amount of physical exertion, such as climbing, crawling and lifting. Claimant credibly testified he had to quit this job after three weeks secondary to pain and an inability to perform the job duties. It is thus reasonable to conclude that if Claimant was unable to work as a roofer secondary to his pain, then it is highly unlikely he would be able to work as a welder. On November 20, 2003, despite signs of malingering, Dr. Danielson released Claimant to light duty work, lifting 25-30 pounds occasionally. Dr. Lowry deferred to Dr. Danielson regarding any work restrictions for Claimant, and these restrictions were consistent with Claimant's failed attempt at roofing. Dr. Danielson's opinion was consistent with the FCE conducted prior to the hearing, which indicated Claimant could perform sedentary to light duty work.

As such, and notwithstanding Dr. Lowry's release to work in 2002, I find the totality of the evidence in record supports Claimant's contention that he cannot return to his former job as a welder. He has thus established a *prima facie* case of total disability.

(2) Suitable Alternative Employment and Wage Earning Capacity

Once the *prima facie* case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment. *Turner*, 661 F.2d at 1038; *P&M Crane*, 930 F.2d at 430; *Clophus v. Amoco Prod. Co.*, 21 BRBS 261, 265 (1988). Total disability becomes partial on the earliest date on which the employer establishes suitable alternative employment. *SGS Control Serv.*, 86 F.3d at 444; *Palombo v. Director, OWCP*, 937 F.2d 70, 73 (D.C. Cir. 1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991). An employer may establish suitable alternative employment retroactively to the day when the claimant was able to return to work. *Newport News Shipbuilding & Dry Dock Co.*, 841 F.2d 540, 542-43 (4th Cir. 1988); *Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294, 296 (1992).

The Fifth Circuit has articulated the burden of the employer to show suitable alternative employment as follows:

Job availability should incorporate the answer to two questions. (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do? (2) Within this category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he could realistically and likely secure? . . . This brings into play a complementary burden that the claimant must bear, that of establishing reasonable diligence in attempting to secure some type of alternative employment within the compass of employment opportunities shown by the employer to be reasonably attainable and available.

Turner, 661 F.2d at 1042-43 (footnotes omitted). An employer may meet its burden of establishing suitable alternative employment by presenting evidence of jobs available in the open market, or by offering the claimant a job in its own facility which the claimant is capable of performing and which does not constitute sheltered employment. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 375, 381 (5th

Cir. 1996). Generally, once the employer successfully establishes suitable alternative employment its responsibility is thereby discharged, as the employer is not a continuing guarantor of employment. See *Edwards v. Todd Shipyards Corp.*, 25 BRBS 49, 51 (1991), *rev'd on other grounds*, 999 F.2d 1374 (9th Cir. 1993), *cert denied*, 511 U.S. 1031 (1994); *P&M Crane Co. v. Hayes*, 930 F.2d 424 (5th Cir. 1991).

Employer relies on the Board decisions in *Edwards, supra*, and *Suppa v. Lehigh Valley R.R. Co.*, 13 BRBS 374 (1981) for the proposition that where an employer establishes suitable alternative employment from which the claimant is subsequently terminated for reasons unrelated to the disability, there is no renewed obligation on behalf of the employer to re-establish suitable alternative employment. Indeed, the Benefits Review Board has stated

The mere fact of the layoff alone cannot entitle claimant to benefits. The Act provides payments for work-related disability, not compensation for periods when an employee is laid off from work for reasons unrelated to employment injuries.

Suppa 13 BRBS at 375.

In *Edwards*, the disabled claimant returned to light duty work at the employer's facility for eleven (11) weeks before he was laid off in a reduction in force; he requested total disability during the lay off period. The ALJ denied benefits, and the Board affirmed, reasoning that because the lay-off was for economic reasons unrelated to claimant's disability, there was no renewed burden to establish suitable alternative employment. The Ninth Circuit reversed the Board's decision, however, holding that the employer failed to carry its burden of establishing suitable alternative employment "because the short-lived employment . . . did not prove that suitable alternate work was '*realistically and regularly*' available' to [Claimant] on the open market." 999 F.2d at 1375. The Court reasoned that a claimant's true wage earning capacity post-injury must be based on sufficiently regular employment. *Id.* It went on to hold that the employer failed to establish suitable alternative employment as the jobs listed in its labor market surveys were either not within Claimant's experience or were not available *Id.* at 1376.

The Ninth Circuit's reasoning in *Edwards* was echoed by the Fourth Circuit in *Norfolk Shipbuilding and Dry Dock Corp., v. Hord*, 193 F.3d 797 (4th Cir. 1999). The Fourth Circuit upheld the Board's decision holding that where an

employer provides a disabled claimant with light duty work but thereafter lays him off for economic reasons, the employer has made the job unavailable to the claimant and thus cannot rely on said job to meet its burden of establishing suitable alternative employment. Rather, the employer must submit evidence of other suitable jobs in order for the claimant to be found partially, and not totally, disabled. See *Hord v. Norfolk Shipbuilding and Dry Dock Corp.*, BRB No. 97-1437 (July 15, 1998)(UNPUBLISHED); *Hord*, 193 F.3d at 801.

The situations in these cases as well as the present case are distinct from those cases where the claimants are terminated for cause from his suitable alternative employment. See *Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), *aff'd sub nom. Brooks v. Dir. OWCP*, 2 F.3d 64 (4th Cir. 1992)(claimant violated company policy); *Walker v. Sun Shipbuilding*, 19 BRBS 171 (1986)(Walker II)(claimant violated collective bargaining agreement). If a claimant is terminated for his own malfeasance, it cannot be said that the job was unavailable, as one must bear the consequences of his actions. This rationale does not fit with the present situation, however, wherein Claimant was terminated due to economic reasons not related to his disability, but not related to his own actions, either. Because the job was subject to lay-off, it was not reasonably available to Claimant or any other worker. As such, the Employer's reliance on these aforementioned cases in supporting its argument is misplaced.

The Fifth Circuit has not weighed in on the precise issue as presented in *Hord* and *Edwards, supra*, that is to say whether a single job subject to lay-off may satisfy the burden of establishing suitable alternative employment. However, it has held that a single job may be sufficient to satisfy the employer's burden of suitable alternative employment, if it is reasonably available in the local community. *P&M Crane Co.*, 930 F.2d at 431, *citing Turner*, 661 F.2d at 1042 (emphasis added). The Fifth Circuit distinguished *P&M Crane* from the Fourth Circuit's decision in *Lentz v. Cottman Company*, 852 F.2d 129, 131 (4th Cir. 1988)(holding that one job is not sufficient to establish the availability of suitable alternative employment) by emphasizing that the employers described a number of other general employment opportunities in the claimants' local communities, in addition to the specific terms and availability of one job opportunity. 930 F.2d at 431. The court's reliance on *Turner's* requirement that any job identified be reasonably available to the claimant is consistent with both *Hord* and *Edwards*. See also *Mendez v. National Steel & Shipbuilding Co.*, 21 BRBS 22 (1988)(where Claimant's lay off was due to lack of suitable work Employer had a renewed obligation to establish suitable alternative employment); *Long v. Washington Group Int'l*, 38 BRBS 277 (ALJ)(2004) and *Anderson v. Northrop Grumman Ship Systems*, 38 BRBS 346 (ALJ)(2004) (if

employee's post-injury job becomes unavailable, employer must show additional suitable alternative employment).

In contrast to Employer's argument in the instant case, the length of a claimant's post-injury employment which results in a lay-off is quite relevant to the determination of whether said job constitutes suitable alternative employment. The standard for suitable alternative employment set forth in *Turner* turns on whether a job is reasonably available, and length of employment is a relevant factor to availability. The Board recently relied upon *Edwards* when it remanded a case back to the ALJ, instructing him to "reconsider whether this [post-injury] position established that claimant's post-injury wages were sufficiently regular such that employer established that suitable alternate employment was realistically and regularly available to claimant on the open market." *Zephir v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 03-0399 (February 26, 2004)(UNPUBLISHED) Slip op. 2-3. The ALJ stated "a person who has regular and continuous post-injury employment 'must take chances on unemployment like anyone else.'" *Zephir v. Newport News Shipbuilding & Dry Dock Co.*, 2001-LHC-1890, 2002-LHC-0426, 2003 WL 246353 (ALJ)(January 28, 2003), *quoting Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649 (1979). On remand, the ALJ found that the claimant's post-injury job lasted 15 months before he was laid off, thus it was sufficiently regular and available to constitute suitable alternative employment. *Zephir v. Newport News Shipbuilding & Dry Dock Co.*, ALJ Nos. 2001-LHC-1890, 2002-LHC-0426; BRB No. 03-0339 (ALJ)(January 21, 2005). *See also Lamb v. Metro Machine Corp.*, 33 BRBS 246 (ALJ)(1999)(where claimant worked for three years post-injury before being laid off, employer need not re-establish suitable alternative employment).

In the present case, Employer provided Claimant light duty work in its facility for only seven weeks following his injury. Claimant's lay-off was secondary to Employer's bankruptcy and subsequent closure, thus completely unrelated to his work-related injury. Nonetheless, pursuant to the foregoing discussion, I find this position was not regularly and realistically available to Claimant. This is supported by the fact the job only lasted for seven weeks before Claimant was laid off. As such, this position cannot constitute suitable alternative employment sufficient to discharge Employer's burden. Employer has offered no other evidence of suitable alternative employment available to Claimant given his age, physical abilities and background. Thus, I find Employer has failed to rebut Claimant's *prima facie* case of total disability.

Notwithstanding Employer's failure to establish suitable alternative employment, the extent of disability must be based on the claimant's vocational capabilities at the time of the hearing. When the claimant performs work for pay (absent extraordinary effort or sheltered employment) total disability may not be awarded. *Harrison v. Todd Pac. Shipyards Corp.*, 21 BRBS 339 (1988); *Shoemaker v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 141 (1980). In the instant case, Claimant was temporarily totally disabled following his July 12, 2001 accident until he started light duty at Employer's facility on February 4, 2002. During his light duty employment, Claimant suffered no loss of wage earning capacity, and thus, he was not economically disabled. However, following his March 15, 2002 lay-off, Claimant was once again temporarily totally disabled. On May 21, 2002, Dr. Lowry placed Claimant at MMI and his disability became permanently totally disabled. Because I discredited Dr. Lowry's opinion Claimant could return to full duty work in July, 2002, and in light of Claimant's short-lived job with Mandel Roofers, I find Claimant's permanent total disability status continued until he began his current job on July 15, 2003.² Only as of this date is Claimant entitled to permanent partial disability benefits.

In determining wage earning capacity, Section 8(h) provides that the claimant's earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his true earning capacity. Where a claimant's post-injury employment is short lived, it does not constitute realistic and regular work available to a claimant in the open market, and as such does not truly reflect a claimant's post injury wage earning capacity. *Newport News Shipbuilding and Dry Dock Co., v. Stallings*, 250 F.3d 868, 872 (4th Cir. 2001)(finding that actual wages were not representative of wage earning capacity because of amount of overtime worked). The employer bears the burden of proving post-injury earning capacity. *DM & IR Railway Co., v. Director, OWCP*, 151 F.3d 1120, 1122-23 (8th Cir. 1998); *Edwards*, 999 F. 2d at 1375. Section 8(h) provides a two-step process to determine post-injury wage earning capacity. First, one must consider whether a claimant's post-injury wages accurately reflect actual wage earning capacity. If so, then the second step need not be reached. *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 797 (D.C. Cir. 1984). If not, then one must consider the claimant's actual capacity for gainful employment. *Walsh v. Northfolk Dredging Co.*, 878 F.2d 380 (4th Cir. 1989)(Table).

² The record does not contain evidence of when Claimant actually started this job. For purposes of computing disability benefits, the parties agreed (per conference call on May 4, 2005) to a date of July 15, 2003.

Employer in the present case offered no evidence of suitable alternative employment for Claimant and similarly failed to submit any evidence of his post-injury wage earning capacity. Claimant sought work at a car repair garage, earning \$6.25 per hour and averaging 30 hours per week. The record is devoid of any evidence which would suggest that this does not accurately reflect Claimant's wage earning capacity. As such, I find Claimant's post-injury wage earning capacity to be \$187.50 per week.

D. Average Weekly Wage

At the hearing the parties were unable to stipulate to Claimant's average weekly wage at the time of his accident. Employer paid Claimant total disability benefits pursuant to an average weekly wage of \$482.61. (CX-3). In his claim for compensation, Claimant asserted his average weekly wage was \$670.00. However, in his post-hearing brief, Claimant argued his average weekly wage should be \$696.00, which I note represented his earnings at Avondale. In its post-hearing brief, Employer stated that \$670.00 was a fair representation of Claimant's average weekly wage and conceded it underpaid Claimant.

Section 10 of the Act establishes three alternative methods for determining a claimant's average annual earning capacity, 33 U.S.C. §§ 910(a)-(c), which is then divided by 52 to arrive at the average weekly wage. 33 U.S.C. § 910(d)(1); *Staftex Staffing v. Director, OWCP*, 237 F.3d 404, 407 (5th Cir. 2000), *on reh'g* 237 F.2d 409 (5th Cir. 2000). Where neither Section 10(a) nor Section 10(b) can be "reasonably and fairly applied," Section 10(c) is a catch all provision for determining a claimant's earning capacity. 33 U.S.C. § 910(c); *Louisiana Insurance Guaranty Assoc., v. Bunol*, 211 F.3d 294, 297 (5th Cir. 2000); *Wilson v. Norfolk & Western Railroad Co.*, 32 BRBS 57, 64 (1998). Both Sections 10(a) and (b) require evidence of the claimant's daily wage records. Here, no such records are in evidence. As such, I find Claimant's average weekly wage must be calculated under 10(c).

Section 910(c) provides:

[S]uch average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or

neighboring locality, or other employment of such employee, including the reasonable value of services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

The judge has broad discretion in determining the annual earning capacity under Section 10(c). *James J. Flanagan Stevedores, Inc., v. Gallagher*, 219 F.3d 426 (5th Cir. 2000)(finding actions of ALJ in the context of Section 10(c) harmless in light of the discretion afforded to the ALJ); *Bunol*, 211 F.3d at 297; *Hall*, 139 F.3d at 1031; *Wayland v. Moore Dry Dock*, 25 BRBS 53, 59 (1991). The prime objective of Section 10(c) is to “arrive at a sum that reasonably represents a claimant’s annual earning capacity at the time of injury.” *Gatlin*, 936 F.2d at 823; *Cummins v. Todd Shipyards*, 12 BRBS 283, 285 (1980). The amount actually earned by the claimant is not controlling. *National Steel & Shipbuilding v. Bonner*, 600 F.2d 1288, 1292 (9th Cir. 1979).

In the present case, Claimant's wage records indicate he earned \$18,816.96 at Avondale from July 12, 2000 until January 14, 2001, a total of 27 weeks. (RX-11, pp. 23-24). Employer's payroll records indicate his first pay check was for the pay period ending February 11, 2001. Claimant worked at Employer for 23 weeks prior to his injury, earning a total of \$16,014.46. (RX-11, p., 25). As suggested by Employer, I find it reasonable to combine Claimant's earnings at Avondale and Employer to determine his average annual wages. His job duties at both employers were essentially identical, as he was a welder foreman at Avondale and a leadman welder at Employer. Claimant earned a total of \$34,831.42 working for 50 weeks in the year preceding his injury, resulting in an average weekly wage of \$669.83 or, as Employer stipulated for ease of calculation, \$670.00 per week. When Claimant started working at his current job on July 15, 2003, he suffered a loss of wage earning capacity in the amount of \$482.50 per week.

E. Medical Benefits

Section 7(a) of the Act provides that “the employer shall furnish such medical, surgical, and other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require.” 33 U.S.C. § 907(a). The Board has interpreted this provision to require an employer to pay all reasonable and necessary medical expenses arising from a workplace injury. *Dupre v. Cape Romaine Contractors, Inc.*, 23 BRBS 86 (1989). A claimant establishes a prima facie case when a qualified physician indicates that treatment is

necessary for a work-related condition. *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 60 (1989); *Pirozzi v. Todd Shipyards Corp.*, 21 BRBS 294, 296 (1988); *Turner v. The Chesapeake and Potomac Telephone Co.*, 16 BRBS 255, 257-58 (1984). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. *Colburn v. General Dynamics Corp.*, 21 BRBS 219, 222 (1988); *Barbour v. Woodward & Lothrop, Inc.*, 16 BRBS 300 (1984). The employer bears the burden of showing by substantial evidence that the proposed treatment is neither reasonable nor necessary. *Salusky v. Army Air Force Exchange Service*, 3 BRBS 22, 26 (1975)(stating that any question about the reasonableness or necessity of medical treatment must be raised by the complaining party before the ALJ). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. *Addison v. Ryan-Walsh Stevedoring Co.*, 22 BRBS 32, 36 (1989); *Mayfield v. Atlantic & Gulf Stevedores*, 16 BRBS 228 (1984); *Dean v. Marine Terminals Corp.*, 7 BRBS 234 (1977).

There was some indication at the formal hearing that Claimant's choice of physician may be an issue. However, this was not listed as an issue in the pre-hearing statement and was not addressed in any amount of detail by the parties at the hearing or in post-hearing briefs. Moreover, I note the stipulations indicate all medical benefits have been paid. However, Claimant shall be entitled to any further medical benefits which are found to be reasonable and necessary for the treatment of his injury pursuant to Section 7 of the Act.

F. Conclusion

In conclusion, I find Claimant is entitled to temporary total disability from July 13, 2001, to February 3, 2002, and from March 23, 2002 until he reached MMI on May 21, 2002. Thereafter, Claimant is entitled to permanent total disability until July 15, 2003 when he started his current job at the garage. I find the light duty job was not sufficiently regular or available to Claimant, as he was laid off after only 7 weeks, thus Employer was not relieved of its burden to establish suitable alternative employment. As Employer failed to submit any evidence of jobs which were reasonably and realistically available to Claimant in light of his physical abilities, age, background and location, Claimant is entitled to an award of total disability benefits until he began work at the garage. Only then do his benefits get reduced to permanent partial disability. Absent any evidence to the contrary, I further find Claimant's earnings at the garage, \$187.50 per week, reflect his post-injury wage earning capacity. Finally, pursuant to the payroll

records in evidence, I find Claimant's average weekly wage at the time of his injury was \$670.00. As of July 15, 2003, he suffered a loss in earning capacity in the amount of \$482.50.

G. Interest

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. *Avallone v. Todd Shipyards Corp.*, 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, *aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that "...the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *See Grant v. Portland Stevedoring Company, et al.*, 17 BRBS 20 (1985).

Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director.

H. Attorney Fees

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I enter the following Order:

1. Employer shall pay to Claimant temporary total disability compensation pursuant to Section 908(b) of the Act for the period from July 13, 2001 to February 3, 2002, and March 23, 2002 to May 21, 2002, based on an average weekly wage of \$670.00 and a corresponding compensation rate of \$446.67.

2. Employer shall pay to Claimant permanent total disability pursuant to Section 908(a) of the Act for the period from May 22, 2002, to July 14, 2003, based on an average weekly wage of \$670.00 and a corresponding compensation rate of \$446.67. Claimant shall be entitled to the annual increase provided for in Section 10(f) of the Act.

3. Employer shall pay to Claimant permanent partial disability benefits pursuant to Section 908(c)(21) of the Act for the period from July 15, 2003, to present and continuing, based on a loss of wage earning capacity of \$482.50 per week and a corresponding compensation rate of \$321.66.

4. Employer shall be entitled to a credit for all wages paid to Claimant from February 4, 2002 to March 22, 2002, and compensation benefits previously paid to Claimant under the Act amounting to \$15,121.67.

5. Employer shall pay Claimant for all future reasonable medical care and treatment arising out of his work-related injuries pursuant to Section 7(a) of the Act.

6. Employer shall pay Claimant interest on accrued unpaid compensation benefits, in accordance with this decision.

7. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.

A

CLEMENT J. KENNINGTON
Administrative Law Judge